

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Halston Homes Limited
("Halston Homes")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/101

DATE OF HEARING: April 14, 1997

DATE OF DECISION: April 17, 1997

DECISION

APPEARANCES

for the appellant:	John Kushniruk Anita Kushniruk
for the complainants:	Dwaine Bax
for the Director:	Jennifer Hagen Shirley Birchnell

OVERVIEW

Pursuant to Section 112 of the *Employment Standards Act* (the “Act”) Halston Homes Limited (“Halston Homes”) has appealed a Determination of a delegate of the Director of Employment Standards (the “Director”), Number CDET 005305, dated February 3, 1997. In its appeal Halston Homes alleges the Determination is wrong because the Director failed to consider evidence that Dwaine Bax had used the truck and a commercial gas card, which were provided to him for the purpose of his employment, for personal use; and Dwaine Bax and Darryl Gillis had padded their time cards.

ISSUE TO BE DECIDED

There is no issue to be decided.

FACTS

On its face the appeal argues there was evidence not taken into account by the Director, of personal use of truck and gas and padding of hours, when she reached the conclusion Halston Homes had contravened subsections 40(1) and 40(2) and Section 44 of the Act and were required to pay Dwaine Bax and Darryl Gillis \$1,730.36.

The Determination indicates Halston Homes raised the issues of personal use and padding of hours in the investigative stage. It also states the following:

It is possible that the employer has the evidence to prove that the complainants were padding their hours and that some money is outstanding for personal gas expenses. John Kushniruk refused to provided [sic] it to me. Therefore, I used the evidence available and tried to assess hours worked on that basis.

The Determination also indicates the details of the allegations of padding hours and personal use of the employer's vehicle and gas card were available during the investigative stage, but were withheld from the Director.

Mr. Kushniruk, who was representing the appellant, was put on notice at the commencement of the hearing that the Tribunal had expressed its unwillingness to consider appeals based on evidence that had been withheld from the delegate of the Director during the investigative process and, to the extent the evidence the appellant sought to produce in the hearing had that character I wanted to hear whether there was good reason it had been withheld. (See *Tri-West Tractor Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97)

The appellant was asked to bear the procedural burden. Mrs. Kushniruk was called to give evidence and began to testify. Before her testimony was complete, Mr. Kushniruk inexplicably announced he had observed enough and would proceed no further, announcing his intention to withdraw from the proceeding and seek his remedy "in court". He was advised by me that, under the *Act*, an appeal to the Tribunal was now the only remedy provided for review of a Determination of the Director and his withdrawal from the hearing would, in all probability, prejudice any attempt to have a court consider his disagreement with the decision or the Tribunal process. He announced it was a criminal court he intended to have address the matter and left the hearing.

ANALYSIS

The refusal of the appellant to participate in the proceeding effectively means I have no evidence before me on the appeal. Even that evidence which was submitted prior to the withdrawal of the appellant may not be considered because to do so would be a denial of a fair hearing to the complainant and the representative of the director because they would have no opportunity to challenge or test that evidence on cross-examination.

As this is a case where the burden of persuasion is on Halston Homes, they have failed to meet this burden and their appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, Number CDET 005305, dated February 3, 1997, be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal